Date: September 29, 1995

Case No. 94-STA-34

In the Matter of:

JAMES R. MASTERSON

Complainant,

v.

GULLETT SANITATION SERVICES, INC.

Respondent.

APPEARANCES:

James R. Masterson, Pro se
Bethel, Ohio
For the Complainant.

Stephen S. Holmes, Esq.
Cors & Bassett
Cincinnati, Ohio
For the Respondent.

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 [hereinafter referred to as "the Act" or "STAA"], 49 U.S.C. § 2305, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

STATEMENT OF THE CASE

The Complainant, James R. Masterson [hereinafter referred to as "the Complainant"], filed a complaint with the Occupational Safety and Health Administration, United States Department of Labor on September 14, 1992, alleging that the Respondent, Gullett Sanitation Services, Inc. [hereinafter referred to as "the Respondent"], discriminated against him in violation of sections

405(a) and (b) of the Act. The Complainant contends that the Respondent reduced his hours and pay after suspecting the Complainant of filing a report with the Occupational Safety and Health Administration [hereinafter referred to as "OSHA"]. The Secretary of Labor, acting through a duly authorized agent, investigated the complaint and, on April 28, 1994, determined that the complaint had no merit. (AX 1)[1] The Complainant filed objections to the Secretary's findings by way of a letter dated May 23, 1994, and requested a formal hearing before an Administrative Law Judge.

A formal hearing was conducted on December 6, 1994 in Cincinnati, Ohio, with both parties being afforded full opportunity to present evidence and argument. The parties were also presented the opportunity to submit post-hearing briefs.

ISSUE

1. Whether the Complainant was discriminated against by the Respondent as a result of having engaged in an activity protected under the STAA.

Based on my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following:

FINDINGS OF FACT

In February 1989, the Complainant began working as a tractor/trailer driver for the Respondent, a business located in Bethel, Ohio and engaged in transporting residential septic sewage and sewer sludge generated by public and private waste treatment facilities to approved disposal sites. (Tr. 238) The Complainant's job consisted of hauling sewer sludge for the City of Cincinnati and Clermont County, Ohio, both of which had contracted with the Respondent for such services. (Tr. 239) The Complainant would haul sewage and sludge from public waste treatment facilities to incineration facilities. Id.

The Complainant repeatedly testified that he usually worked 24 hours a day, seven days a week during his employment tenure with the Respondent. (Tr. 81) The Complainant testified that he complained about the hours he worked and that he knew that he was violating United States Department of Transportation [hereinafter referred to as "DOT"] regulations, but he never refused to drive

[1] In this Recommended Decision and Order, "AX" refers to Administrative exhibits, "RX" refers to Respondent's exhibits, "CX" refers to Complainant's exhibits, and "Tr." refers to the transcript of the hearing.

because he was in the process of building a new house and he needed to maintain his job. Id.

During his tenure with the Respondent, the Complainant regularly complained to Respondent's President Don Gullett, Secretary/Treasurer Patricia Gullett, and mechanic John Simmons about the condition of the truck he was assigned to drive. (Tr. 396) Furthermore, the Complainant testified that, in 1990, he refused to drive an allegedly unsafe truck and thereafter was not given any work for three days. (Tr. 30-31) However, in May 1990, the Complainant again refused to drive an allegedly unsafe truck and the Respondent permitted the Complainant to drive another truck. (Tr. 33) The Complainant further testified that the Respondent never threatened to punish him if and when he refused to drive a truck he believed to be unsafe. (Tr. 33-34)

The Complainant testified that he made one formal complaint to a government entity concerning the Respondent while in its employ. (Tr. 71) The Complainant made a formal complaint with the Ohio Department of Transportation [hereinafter referred to as "ODOT"] "probably six months" prior to termination of his employment with Respondent. Id. The Complainant did not inform the Gulletts of his complaint nor does he have any reason to believe that they ever became aware of such complaint. (Tr. 73) Furthermore, the Complainant never contacted the Public Utilities Commission of Ohio [hereinafter referred to as "PUCO"] or the Federal Interstate Commerce Commission [hereinafter referred to as "ICC"] prior to the termination of his employment with the Respondent. (Tr. 74-75)

On July 1, 1992, in the course of his employment with the Respondent, the Complainant collapsed beside his truck, allegedly due to waste fume inhalation. After receiving a telephone call from a waste treatment facility employee informing them that the Complainant had recently been there and was not feeling nor looking well, Mr. and Mrs. Gullett found the Complainant lying on the ground beside his truck, which was parked in a park. (Tr. 241) The Complainant was taken to the hospital where he was treated and released. Thereafter, the Complainant returned to work after completing and passing a return-to-work physical examination on July 22, 1992. (RX A)

The facts at the heart of the Complainant's cause of action occurred in September, 1992. On Wednesday, September 2, 1992 the Complainant failed to report to work and remained absent through Friday, September 4, 1992. (Tr. 109) The Complainant failed to inform the Respondent of these absences in advance, as required by company policy. (CX 2) Upon the Complainant's return to work on Tuesday, September 8, 1992, Respondent's President Dan Gullett requested a written medical excuse for the Complainant's unannounced and unexcused absence. (Tr. 324)

On the next day, Wednesday, September 9, 1992, the Complainant resumed his normal route. That evening, the Gulletts received a telephone call from another employee, Mickey Bailess, who informed them that he and the Complainant had been stopped by a PUCO official for an inspection. (Tr. 242) The Gulletts immediately traveled to the scene of the inspection at which the PUCO inspector informed them that the Complainant's medical card had expired and, as a result, he was unable to legally operate a commercial motor vehicle. (Tr. 242-243) The PUCO inspector also found a crack in the rear tail piece on the Complainant's truck and, consequently, put the truck out of service. (Tr. 395) The Gulletts then arranged for the Complainant's truck to be towed back to the Respondent's place of business. Id. Pursuant to the PUCO inspector's order, the Complainant was released from duty because he was unable to drive legally without an updated medical card. (Tr. 338) The Complainant thereafter arranged for transportation home. (Tr. 339)

The parties disagree about the events surrounding the September 9, 1992 PUCO inspection of the Complainant's truck. The Complainant testified that Mrs. Gullett threatened him at the scene of the inspection and made a slashing motion across her neck which the Complainant interpreted to indicate that he was fired. (Tr. 42-43) The Complainant further testified that Mrs. Gullett accused him of arranging the PUCO inspection, which the Complainant immediately denied. Id. Conversely, the Respondent contends that the Complainant was not discharged on September 9, 1992. Mrs. Gullett admitted that she asked the Complainant at the scene whether he had contacted the PUCO officials for an inspection, but that she never gave any indication to the Complainant that he was fired.[2] (Tr. 338) Mrs. Gullett testified that she asked the Complainant if he arranged the PUCO stop and inspection because the location where the Complainant was stopped was not on his normal route; thus, the Gulletts were curious as to why the Complainant was at that location when the stop and inspection took place. (Tr. 337)

Two days later, on September 11, 1992, the Respondent mailed the Complainant a notice of suspension indicating that he would not be permitted to work until certain conditions were satisfied. (Tr. 339; RX D) Such conditions included securing a medical certification, submitting a valid medical excuse for the September 2-4 absences, and in the future, abiding by the uniform procedures for

[2] Mrs. Gullett testified that the slashing movements she made across her neck which the Complainant believed to indicate that he was fired were simply acts associated with her nervous habit of playing with her necklace. (Tr. 338) Although this aspect of her testimony stains credulity I find the remainder of Mrs. Gullett's testimony to be credible and the record as a whole contains no conclusive evidence that the Complainant was fired at the site of the PUCO inspection on September 9, 1992 by Mr. or Mrs. Gullett.

all employees, which were explained in detail in the letter. Id. Once the Complainant fulfilled these obligations, he would be permitted to return to work. Id.

Pursuant to the Respondent's letter of September 11, the Complainant completed a physical examination at Mercy Medical Center, which was paid for by the Respondent. (Tr. 111; RX F) The Complainant's successful completion of both the physical examination and a drug test enabled him to again legally operate a commercial motor vehicle. Also, in accord with Respondent's request, the Complainant arranged for a medical excuse to be sent to the Respondent explaining his absences earlier that month. (RX E)

Here again, the testimony of the parties conflicts. Mr. Gullett testified that after the Complainant fulfilled his obligations he was asked to return to work. (Tr. 252) Mr. and Mrs. Gullett, as well as two additional witnesses, testified to being present when Mrs. Gullett telephoned the Complainant on September 28, 1992 and requested that he return to work the next day. (Tr. 252, 344-46, 398, 412) Conversely, the Complainant testified that he never received any such telephone call. (Tr. 364) Thereafter, on September 29, 1992, the Complainant failed to report to work. Mrs. Gullett testified that she again telephoned the Complainant to ascertain why he failed to report to work. According to Mrs. Gullett, the Complainant informed her that he quit pursuant to the advice of his attorney. (Tr. 347) The Complainant stated that he informed Mrs. Gullett that he could not return to work until October 30, 1992 on the advice of his physician, and that Mrs. Gullett informed him that he may not have a job at that time. (See AX 1) Toward the end of the conversation, Mrs. Gullett requested that the Complainant return his uniform, credit card and keys which were owned by the Respondent. Id. The items were later returned to the Gulletts' home. Id.

Subsequently, the Complainant filed a claim for worker's compensation with the State of Ohio regarding the July 1, 1992 incident when he collapsed allegedly due to waste fume inhalation. (RX I) The Complainant's claim was eventually denied by the Industrial Commission which found that the Complainant did not sustain an injury nor contract an occupational disease in the course of his employment. (RX J) Additionally, the Complainant filed a claim for unemployment benefits with the State of Ohio. The Unemployment Commission denied the Complainant's claim after finding that he voluntary quit his employment without a real, substantial and compelling reason, and therefore was not entitled to benefits. (RX H)

I find that testimony of Respondent's owners, Daniel and Patricia Gullett, to be credible. I likewise find the testimony of witnesses John Simmons and Doren Kyer to be credible. Conversely, I find the testimony of the Complainant, James Masterson, and his

wife, Tina Masterson, to be disoriented and questionable at best. Additionally, I find the testimony of Cindy Rose to be inherently incredible. Finally, the testimony of the Complainant's remaining witnesses, while credible, does not establish any probative evidence useful in the determination of this case.

CONCLUSIONS OF LAW

Applicable Law

Section 405 of the STAA, provides, in pertinent part:

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment[:]
>
> (a) because such employee . . . has filed any complaint or instituted or caused to be instituted any proceeding relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order, or has testified or is about to testify in any such proceeding [or]
>
> (b) for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from the employer, and have been unable to obtain, correction of the unsafe condition.

49 U.S.C. § 2305 (Supp. 1994)

Jurisdiction

In opening argument and post-hearing brief, the Respondent contends that the determination of this matter does not fall within the jurisdiction of the Department of Labor. (See Tr. 229-30; Post Hearing Brief of Respondent, at 6) The Respondent argues that, because the Complainant did not cross interstate lines while engaging in his employment with the Respondent, the Respondent does

not meet the definition of employer[3] under the STAA and is not within the Act's jurisdiction. However, it is not necessary to cross state lines to be within the ambit of Congress' power to regulate interstate commerce. Congress' power extends to intra-state commerce which exerts a substantial effect on interstate commerce. Taylor v. J.K. Trucking, 88-STA-4 (Sec'y Oct. 31, 1988) Additionally, the United States Supreme Court long ago adopted an extremely broad definition of "interstate commerce" which continues to the present. See e.g. United States v. Darby, 312 U.S. 100 (1941); Edwards v. California, 314 U.S. 160 (1941).

Furthermore, the Respondent admitted, through counsel, that its employees travel on Interstate 471 through Kentucky and Ohio in the course of their employment although all other activity is conducted within Ohio's boundaries, including all work performed by the Complainant. (Tr. 230) The United States Court of Appeals for the Ninth Circuit has held that operators performing work on interstate highways are engaged in interstate commerce for purposes of the Fair Labor Standards Act. Brennan v. Keyser, 507 F.2d 472, 474-75 (9th Cir. 1974, cert. denied, 420 U.S. 1004 (1975).

Therefore, because applicable precedent requires an extremely broad interpretation of "interstate commerce" and the fact that evidence was produced showing that Respondent's employees, at the very least, traveled on interstate roadways, I refuse to dismiss this case for lack of jurisdiction, and consequently, I will decide the Complainant's cause of action on its merits.

Prima Facie Case

Initially I note that while I granted the Complainant, acting pro se, leeway with regard to matters of procedure, the burden to be placed upon him of proving the elements necessary to sustain his claim of discrimination under the STAA may not be lessened due to his pro se status. Flener v. H.K. Cupp, Inc., 90-STA-42 (Sec'y Oct. 10, 1991).

To establish a prima facie case of discriminatory treatment under the STAA, the Complainant must prove: (1) that he was engaged in an activity protected under the STAA; (2) that he was the subject of adverse employment action; and, (3) that a causal link exists between his protected activity and the adverse action of his employer. Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). The establishment of the prima facie case creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

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[3] The STAA defines "employer" as "any person engaged in a business affecting commerce who owns or leases a commercial vehicle in connection with that business. . . " 49 U.S.C. § 2301.

(1) Protected Activity

Under Section 405 of the STAA, protected activity may consist of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as complainants to management, relating to a violation of a commercial motor vehicle safety rule, regulation, standard, or order. 49 U.S.C. § 2305; See also Reed v. National Minerals Corp., 91-STA-34 (Sec'y Decision, July 24, 1992); Davis v. H.R. Hill Inc., 86-STA-18 (Sec'y Decision, March 18, 1987).

The Complainant testified that he made a formal complaint with ODOT approximately six months prior the termination of his employment with the Respondent on September 9, 1992. As stated, a formal complaint to a government agency constitutes a protected activity under STAA. 29 U.S.C. § 2905(a); Reed, supra. The Complainant need not prove the merit of his reported violation to receive protection under the whistleblower provision of the STAA. Yellow Freight Systems, Inc. v. Martin, 954 F.2d 353, 356-57 (6th Cir. 1992). A complaint is protected under the STAA section 405(a) even if the alleged violation complained about ultimately is determined to be meritless. Hernandez v. Guardian Purchasing Co., 91-STA-31 (Sec'y June 4, 1992) Thus, I find that the Complainant's contact with ODOT regarding safety concerns constitutes a protected activity under the STAA.

The evidence also clearly indicates that the Complainant regularly complained to his superiors, i.e., the Gulletts, about the safety of various vehicles to which he was assigned to drive. Additionally, the Complainant testified that he often refused to operate a vehicle because of safety concerns. Internal company complaints are considered protected activity under the STAA. Davis v. H.R. Hill, Inc., 86-STA-18 (Sec'y March 18, 1987), slip op. at 3-4. Also, section 405(b) of the STAA prohibits discriminatory treatment in response to an employee's refusal to operate a vehicle "because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment." 49 U.S.C. § 2305(b). This ground for refusal carries further requirements. The Complainant must prove (1) that the unsafe condition causing his apprehension of injury must be such that a reasonable person, under the same circumstances, would perceive a bona fide hazard and (2) that the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition. Reed, supra.

The Complainant testified that the Respondent never threatened to punish him for refusing to operate an allegedly unsafe vehicle, but rather allowed the Complainant to operate another truck which he considered to be safe. Thus, the Complainant cannot satisfy the second element described above because the Respondent acceded to the Complainant's wishes regarding his safety concerns. Where the Respondent substitutes another vehicle upon the complaints of a

driver, a claim of discrimination is not supported. Mace v. Ona Delivery Systems, Inc., 91-STA-10 (Sec'y Jan. 27, 1992). Therefore, neither the Complainant's internal complaints regarding safety nor his occasional work refusals constitute protected activities because the Respondent immediately corrected the bases for the Complainant's concerns.

The Complainant further testified that he often complained about the excessive hours he was required to work. However, the only evidence of the Complainant's work being in excess of the prescribed amounts in the STAA is the Complainant's highly suspect testimony that he worked 24 hours per day during 95% of his employment tenure with the Respondent. On the basis of this testimony alone, the Complainant failed to prove a protected activity regarding complaints about his hours of employment.

However, the record clearly indicates that the Complainant contacted ODOT prior to the termination of his employment. As such activity is protected under the STAA, I find that the Complainant has satisfied the first element of his prima facie case under the employee protection provisions of the Act.

(2) Adverse Employment Action

The Complainant contends that he was discharged on September 9, 1992, and that such discharge constitutes an adverse employment action under the Act. Unfortunately for the Complainant, the record does not support his contention that he was discharged.

On September 9, 1992, while engaged in his employment with the Respondent, the Complainant was subjected to a stop and inspection by a PUCO official. Subsequently, the Respondent's owners traveled to the scene of the inspection at which they engaged in a heated exchange with the Complainant. The Complainant alleged that during this exchange he was discharged from employment by the Respondent. The Respondent denies this allegation and contends that the Complainant was never discharged but rather voluntarily quit his employment on September 29, 1992.

As stated above, acts subsequent to September 9, 1992 do not support the Complainant's contention. Although the Complainant claimed to have been fired on September 9, 1992 by the Respondent, he testified that he received a letter dated September 11, 1992 stating that he was suspended from employment until he fulfilled certain obligations. The Complainant further testified that he was not surprised to receive this notice of suspension, even though he believed to have been discharged two days earlier. Furthermore, pursuant to the terms of the September 11 letter, the Complainant completed a physical examination at the hospital selected by the Respondent and for which the Respondent stated it would pay. Additionally, again following the instructions of the September 11 letter, the Complainant arranged for a medical excuse to be mailed

to the Respondent explaining his absence from work from September 2 through September 4, 1992. The bulk of the evidence further indicates that upon receipt of the results of the physical examination and an excuse for his prior absences, the Respondent lifted the Complainant's suspension and requested that he return to work on September 29, 1992. Therefore, I find that the preponderance of the evidence does not support the Complainant's contention that he was discharged on September 9, 1992.

Nonetheless, the Respondent does not dispute that the Complainant was suspended on September 9, 1992 nor that such suspension constitutes an adverse employment action under the Act. Also, a question remains as to whether the Complainant voluntarily quit his employment on September 29, 1992 or was discharged at that time. The only relevant evidence on this matter is the conflicting testimony of Mrs. Gullett and the Complainant concerning their telephone conversation on that date. Giving the Complainant the benefit of doubt, I will consider the September 29, 1992 termination of his employment with the Respondent to constitute an adverse employment action under the STAA.

Therefore, I find that the Complainant has satisfied the second requirement of the prima facie case by showing that an adverse employment action was taken against him.

(3) Causation

In order to prevail in his claim, the Complainant must prove, by a preponderance of the evidence, that the above-mentioned protected activity of contacting OSHA and the resulting adverse employment action taken against him are connected by a causal link. In other words, the Complainant must present evidence sufficient to raise an inference of causation. Carroll v. J.B. Hunt Transportation, 91-STA-17 (Sec'y June 23, 1992). The Secretary has declared that, in establishing the causal link between the protected activity and the adverse action, proof of the employer's knowledge of the employee's protected activity is sufficient. See Osborn v. Cavalier Homes, 89-STA-10 (Sec'y July 17, 1991); Zessin v. ASAP Express, Inc., 92-STA-0033 (Sec'y Jan. 19, 1993).

The record indicates that two adverse employment actions were taken against the Complainant by the Respondent. I will discuss the possible causal link between each of these adverse employment actions and the Complainant's protected activity

Suspension of September 11, 1992

The Complainant will succeed on his claim if he can prove that the September 11, 1992 suspension was motivated by discriminatory intent. The facts indicate that the Complainant was relieved of duty after the PUCO inspection of his vehicle on the evening of September 9, 1992. The PUCO official discovered that the Complain-

ant did not have a valid medical card, as required for commercial motor vehicle operators under federal law. See 49 C.F.R. § 391.41. The PUCO official informed the Respondent's owners that the Complainant was prohibited under federal law from operating a commercial motor vehicle until he secured a valid medical card. Consequently, the Respondent's owners relieved the Complainant from his duty and thereafter suspended him on September 11, 1992 until he received a valid medical card. There is no evidence that the suspension of the Complainant was based on the Respondent's allegation that the Complainant contacted PUCO. The Respondent offered credible testimony which indicated that the only reason the Complainant was asked if he arranged the PUCO inspection was because he was curiously off his normal route at the time of the inspection. The Complainant offered no credible evidence that his suspension was based on his involvement in the PUCO inspection other than his failure to produce a valid medical card. Thus, the evidence fails to indicate that a causal link existed between the suspension of the Complainant and his prior engagement in protected activities. If the Respondent had not suspended the Complainant from driving until he received a valid medical card, any future employment of the Complainant without such card would have been in violation of the STAA. Therefore, the Respondent had no choice under the STAA but to suspend the Complainant pending a physical examination.

Furthermore, the Complainant presented no evidence that the Respondent was aware of his formal complaint to ODOT prior to the September 9 incident. In fact, the Complainant testified that he believed that the Respondent was not aware of his contact with ODOT. Therefore, the Complainant failed to raise an inference of causation by presenting evidence of the Respondent's knowledge of his protected activity of reporting safety concerns to the government. Therefore, the Complainant has failed to present evidence of a causal link between his suspension of September 9, 1992 and his protected activities.

Termination of Employment of September 29, 1992

The question of whether the Complainant was fired or voluntarily quit on September 29, 1992 is a more debatable issue. The bulk of the testimony indicated that the Respondent requested that the Complainant return to work on Tuesday, September 29, 1992. The Complainant had complied with the terms of the September 11, 1992 letter of suspension and therefore was eligible to return. Four witnesses testified to hearing Mrs. Gullett request that the Complainant report to work on the morning of September 29, 1992. The Complainant failed to report to work on that day. Thereafter, the Complainant either quit or was fired, and was asked to return company property which he possessed. Even viewing the situation in the light most favorable to the Complainant, i.e., that he was fired on September 29, 1992, the Complainant nonetheless failed to present any conclusive evidence of a causal link between his

protected activities and the termination of his employment on September 29, 1992. The evidence supports only the conclusion that if, in fact, the Complainant was fired on September 29, 1992, it was directly the result of his failure to report to work on that day and not because of his protected activities in the past. Thus, the Complainant's failure to report to work, as admitted by the Complainant, gave the Respondent legitimate cause to discharge the Complainant at that time. Therefore, the Complainant has failed to prove the existence of a causal link between the termination of his employment with the Respondent his protected activity.

Finally, I find that the Complainant has failed to present sufficient evidence of a causal link between his protected activities and either of the adverse employment actions taken against him. Consequently, the Complainant has failed to satisfy the required elements of his prima facie case for discrimination under the STAA.

Rebuttal of the Prima Facie Case

Assuming arguendo that the Complainant satisfied his prima facie case, I nonetheless find that the evidence presented by the Respondent successfully rebuts the inference of discrimination. To rebut this inference, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. Carroll, supra. A credibility assessment of the nondiscriminatory reason espoused by the employer is not appropriate; rather, the Respondent must simply present evidence of any legitimate reason for the adverse employment action taken against the Complainant. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

Concerning the September 11, 1992 suspension, the Respondent was informed by the PUCO inspector that the Complainant's medical card was outdated and he was prohibited from operating a commercial motor vehicle under the STAA. Thus, as a result, the Complainant was relieved from duty and suspended until he completed a physical examination and received an updated medical card. Regarding the September 29, 1992 termination of the Complainant's employment, assuming he was fired, the Respondent nonetheless had legitimate business reasons for taking such action because the Complainant failed to report to work as instructed. Therefore, the Respondent successfully rebutted the inference of discrimination relating to any and all possible adverse employment actions taken against the Complainant.

Pretext

If the employer successfully presents evidence of a nondiscriminatory reason for the adverse employment action, the Complainant must then prove, by a preponderance of the evidence, that the legitimate reasons proffered by the employer are mere pretexts for discrimination. Moon, supra; See also Texas Dep't of Community

Affairs v. Burdine, 450 U.S. 248, 253 (1981). In proving that the asserted reason is pretextual, the employee must do more than simply show that the proffered reason was not the true reason for the adverse employment action. The employee must prove both that the asserted reason is false and that discrimination was the true reason for the adverse action. St. Mary's, supra, at 2752-56. For reasons discussed above, the Complainant failed to prove that either the suspension of September 11, 1992 or the termination of his employment on September 29, 1992 was motivated by discrimination.

In conclusion, I find that the Complainant has failed to prove, by a preponderance of the evidence, a causal link between his protected activities and any adverse employment action taken against him by the Respondent. Therefore,

ORDER

IT IS ORDERED that the complaint of James R. Masterson be DISMISSED.

_____
DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE

This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).